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Making Human Rights a Reality Across Europe -
The Work of the European Court of Human Rights

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I have to begin by confessing that I am here somewhat on false pretences. The impressive title of my talk today, dreamt up by Keith Bush, augurs a deeply researched and wide-ranging appraisal of the Strasbourg Court's role in today's troubled Europe. Well, you will be getting nothing like that. My case-load as the national judge for one of the bigger countries, means that I have limited time for preparing external talks. What you will be getting, therefore, is a ragbag of observations on points that Keith indicated to me as being likely to be of interest to you. Those points are:

- the practical issue of case-overload that has been dogging the single permanent European Court of Human Rights since it was set up in 1998;
- the "living-instrument" doctrine;
- the proposed accession of the European Union to the Convention;
- some current judicial highlights concerning the UK;
- the relationship between the Convention and the participating European countries other than the UK;
- the likely development of the Convention system in the future.

1. Philosophical and Historical Origins of the Convention

As a preliminary, it is not without interest for the current debate in the United Kingdom about the Convention and its Europe-wide Court to begin with a short explanation of the philosophical and historical origins of the Convention.

The Convention was drafted in the immediate aftermath of the Second World War within the Council of Europe, an international organisation for intergovernmental cooperation originally established in 1949 with ten, predominantly Western European, Member States and now comprising 47 member States. The broader aim of the original Contracting States, in agreeing to act together through the Convention machinery, was to set up an early warning system of any tendencies of backsliding towards dictatorship and thereby to prevent future conflict in Europe.

Yet when we look at the functioning of the Convention enforcement machinery after it came into operation in 1953, we do not see a sombre panorama made up exclusively or even mainly of serious cases of incipient totalitarianism being nipped in the bud. As the then President of the Strasbourg Court, Rolv Ryssdal,

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who was at the time also President of the Norwegian Supreme Court, put it in the early 1970s, this was neither unnatural nor unforeseeable: the logic of the right of individual petition required that the Convention system develop into one of quasi-constitutional protection of fundamental rights at the European level.

As it has come to operate in practice, the Convention provides two layers of protection: firstly, against bad-faith abuse of governmental power and, secondly and more typically of the way the system actually works in practice, against excesses of majority rule – that is national measures, including primary legislation, taken in good faith in the normal exercise of democratic discretion but which, although imposed in the general interest and for legitimate purposes, entail a disproportionate limitation on individual liberty. At this second layer the Convention can be seen, to paraphrase the words of the British academic Ed Bates in his highly readable book on the history of the Convention, as a Europe-wide Bill of Rights of the kind found in many national constitutions. It is therefore perhaps a little surprising that some in the United Kingdom appear to have woken up only recently to the fact that the Convention system, firstly, represents an inevitable – though limited – inroad into national sovereignty, including parliamentary sovereignty, and, secondly, is not concerned exclusively with grave, flagrant violations of human rights of the type found in totalitarian or dictatorial regimes.

2. Case-Overload

The first point to be aware of under this head of is that the Court's caseload is varied:

- firstly, 90% or so of the applications disposed of are clearly inadmissible and do not raise a human rights issue warranting examination on the international level;
- secondly, a substantial proportion of the caseload is represented by groups of meritorious applications (sometimes running into thousands) raising essentially the same grievance (such a length of judicial proceedings, prison conditions, execution of civil judgments, the operation of some large-scale legislative scheme – such as rent control or restitution of property seized during the communist era);
- finally, the numerically small percentage of meritorious applications are processed in accordance with an order of priority, urgent applications (involving, say, children, end-of-life issues, expulsion of asylum seekers and so on) and complaints under the core safeguards of the Convention (such as the right to the life and the prohibition of torture and inhuman or degrading treatment) being accorded the highest priority.

At one point in 2011 there were 161,000 applications pending (double the pending total of three years earlier), of which roughly 100,000 were identified as being clearly inadmissible, for an annual intake of 65,000 registered applications and annual output of 52,000 applications disposed of, including about 1,500 by

means of a judgment. The imbalance and the consequences of that imbalance are evident.

Protocol 14 to the Convention, which came into force in 2010, introduced simplified time-saving procedures for certain categories of less important cases – notably (a) providing for clearly inadmissible applications to be rejected summarily by a single judge and (b) enabling routine cases and repetitive cases covered by well established case-law to be decided by three-judge committees – instead of seven-judge chambers – in a pared-down procedure. Parallel to these streamlined procedures, the Court itself developed a pilot-judgment procedure whereby systemic or structural problems in a national legal system capable of generating multiple applications are addressed in one single pilot case, rather than in successive, repetitive cases one after another in a full adversarial manner.

Thanks to these new procedural tools, the volume of pending cases has been dramatically reduced to 66,000 today. In 2014 52,000 applications were registered, but more than 86,000 applications were disposed of, including almost 80,000 rejected as inadmissible by means of the single-judge procedure. A remarkable turnaround when compared with the figures in previous years before the centralised Filtering Section of the Registry was set up, but a turnaround confined to the statistically enormous category of the most simple cases, the clearly inadmissible ones. The harsh reality is that the case-overload is still with us – and dangerously so –, in that concealed in this reduced total of 66,000 applications are significant backlogs of meritorious applications: not only do repetitive applications (at 33,000) still represent about half of the pending caseload despite the success of the pilot-judgment procedure, but there are accumulating routine applications and, most worryingly, for a Court that delivered just under 2,400 judgments in 2014 a backlog of no less than 10,000 high-priority, serious cases. The Strasbourg Court is of course actively seeking corrective solutions within the existing treaty framework for removing the delays in dealing with this, the most important of the categories of cases before it. Not all countries are concerned, it should be noted – for example, not the United Kingdom, where there is no significant imbalance between intake and output and no significant delays – but a group of high case-count, problem countries.

And spilling over from the judicial procedure proper before the Court itself, some worrying delays in the follow-up process of execution of judgments, which falls under the supervision of the Committee of Ministers of the Council of Europe (a political body), should not be ignored either.

In sum, the picture, while a lot better than it was some years ago, improving and, I would say, encouraging, is still far from rosy. The Court will need the understanding and support of the Governments, and also the judiciaries, the legal professions and the public, in the Convention countries for the innovations, and probably corner-cutting, that it will be obliged to introduce in order to master the beast of its case-overload, without sacrificing the effectiveness of the right of individual petition.

3. The “Living-Instrument” Doctrine

Methods of interpretation of the Convention may appear to be a rather dry and technical topic, but, as far as the impact of the Strasbourg Court’s rulings on the governance of the participating countries is concerned, they are crucial, in that they go to the question of how intense the Court’s scrutiny is of the democratic measures taken by the national authorities – the parliaments, the regional assemblies, the courts, the administrative authorities and so on.

This is particularly so as regards the interpretative principle – nowadays often criticised (and misunderstood) by those who fear an over-interventionist and over-expansionist Strasbourg Court – which is known as “evolutive interpretation”, whereby the Convention is treated as a “living instrument” which is not frozen to the connotations it had in 1950 but which is to be interpreted in the light of present-day conditions, so as to seek out the current meaning of indeterminate concepts stated in the Convention. It is evident that concepts such as “degrading treatment”, “private life”, “family life”, “freedom of expression”, “democratic society” are linked to social conditions and, consequently, not static but capable of evolving with time.

This “evolutive” approach to interpretation of instruments protecting fundamental rights is not peculiar to international law, but is found in many national legal systems where there is constitutional protection of fundamental rights. In 1819 Chief Justice Marshall of the United States Supreme Court made his off-quoted dictum that “we must never forget that it is a constitution we are expounding”, “a constitution intended to endure for ages to come”. In another case in 1910 the American Supreme Court said: “Time works changes, brings into existence new conditions and new purposes. Therefore a principle to be vital must be capable of wider application than the mischief to which it gave birth.” Similar dicta from the Irish and Canadian Supreme Courts, and the British Privy Council in relation to the constitutions of former colonies, could be added. Moreover, as Dominic Grieve, the former Attorney General, put it in a recent lecture in Scotland, “judicial interpretation to reflect current values is not new and is rooted in our common law tradition and not just an invention of the Strasbourg Court”.

This technique of treaty construction of course has its limits. The Strasbourg Court is evidently not empowered to start “predicting tomorrow’s values”, to use the colourful expression of one American writer. As was said in a separate opinion in a 1986 case: “An evolutive interpretation allows variable and changing concepts already contained in the Convention to be construed in the light of modern day conditions..., but it does not allow entirely new concepts or spheres of application to be introduced into the Convention: that is a legislative function that belongs to the Member States of the Council of Europe.”

4. European Union Accession to the Convention

Despite the growing convergence of Convention law and European Union law regarding fundamental rights, up till now the Strasbourg Court has had no

jurisdiction to entertain applications brought against the European Union by individuals or companies aggrieved by some adverse decision taken by one of the European Union institutions, for the simple reason that the European Union, an international organisation, was not, and could not be, a Contracting Party to the Convention, the sole Contracting Parties being the States which are members of the Council of Europe.

One of the major innovatory changes introduced by the Treaty of Lisbon, which came into force in 2009, is that henceforth the European Union is not simply vested with the previously lacking legal capacity to accede to the Council of Europe's Convention, but is obliged to do so – albeit subject to certain conditions.

There is no need to be a soothsayer to see that participation of the European Union in the international system of human rights protection set up under the Convention is likely to have repercussions for the Strasbourg Court's workload and also for the relationship between the two European Courts. We are all aware of the fear in some quarters that accession will mean not only welcome unification of jurisprudence on human rights between the two European Courts, but also encroachment by the Strasbourg Court into the monopoly which has been conferred on the Justice of the European Union in Luxembourg Court by the Treaties to interpret authoritatively European Union law. The recent Opinion No. 02/13 of the Luxembourg Court concerning the draft accession agreement that had been negotiated between the Council of Europe and the European Commission on behalf of the European Union has thrown not just a few drops but whole buckets of cold water on the enthusiasm of committed accession-supporters. The Opinion finds the accession agreement to be incompatible with European Union law in seven main respects, which, being rather technical for the most part do not merit being gone into today. Whatever happens in the wake of this negative Opinion, European Union accession to the Convention is not therefore to be expected for quite a few years yet.

Most academic commentators have been critical of the Opinion, talking of European Union protectionism, a strange Opinion and even Humphy Dumpty and using such terms as “overkill”, “devastating” and “unmitigated disaster”. The current President of the Strasbourg Court, the Luxembourgier Dean Spielmann, went on public record at a lecture on Cambridge in March of this year to say that his own reaction was one of great disappointment.

Personally, I believe that rather than railing against the Luxembourg Court and being pessimistic, the preferable approach is to be sanguine and forward-looking. The two European Courts are living organisms evolving over time in their attitudes. Their composition will undergo change. They are condemned to working together. Life goes on and cases will continue to come in. These are platitudes, but by definition behind platitudes are truths. It is clear that the reality of European Union accession has disappeared over the horizon. Whether it will come back into sight in the near or the not too near future remains to be seen. Even in the event of successful re-negotiation of the agreement, there is no guarantee that the Luxembourg Court will not play the recidivist and again, for the third time, find legal obstacles in the way of accession.

In the meantime, as far as the legal position is concerned, the status quo remains. On the ground, the two Courts must resume their cooperation. If the Opinion is to be read as disclosing a degree of distrust towards the Strasbourg Court on the part of its Luxembourg partner, then perhaps the Strasbourg Court would be doing itself no harm to look at itself and ask whether there is any good cause for such distrust. Traffic in these matters is rarely one way only. For me, the duty of the two Courts towards the people of Europe is to rebuild mutual trust. The enthusiasm of the public for the project of European unity is on the wane. In such a difficult climate it would be irresponsible for the two Courts to be at loggerheads or even merely to be disdainful of what the other is doing. If accession is in abeyance, the two Courts should not start ploughing their own separate furrows, gradually drifting apart, but should start thinking of the positive ways in which, in the absence of full-blown accession, the interaction between the European Union legal order and the Convention system of protection can be strengthened. The States should not be put in the uncomfortable position of having their loyalty split between their European Union obligations and their Convention obligations. Hopefully, dialogue between the two Courts to enable the highest degree of coherence of human rights protection throughout Europe will resume – dialogue through judgments delivered in which there is mutual recognition of the European-level role of the other Court, as well as dialogue through meetings.

5. Some current judicial highlights among the British applications

One of the main criticisms made of Strasbourg case-law in some quarters has been the way in which the Convention responsibility of the Convention States, and thereby the jurisdiction of the Strasbourg Court, have been extended by evolutive interpretation – in line with developments in public international law, it should be said – beyond the confines of the national territory, so as, for example, to encompass the acts of the Contracting States' armed forces when on military missions abroad. Thus, the United Kingdom and the Netherlands have in recent years been found answerable under the Convention for certain acts of their troops in Iraq, during the initial phase of armed conflict as well as during the following period of occupation by coalition forces. However, in *Hassan v. United Kingdom*, decided by the Grand Chamber in September of last year, the Court adopted an interpretation of the right-to-liberty clause that reconciled the Convention, in a common-sense way, with the less onerous requirements of international humanitarian law.

In the absence of an intention to bring criminal charges as such, Article 5§1 of the Convention does not permit internment of prisoners of war or civilians judged to be a threat to security, even in the active phase of international armed hostilities. Despite the Third and Fourth Geneva Conventions being especially designed to govern and provide safeguards in relation to such war-time internment, a strictly literal interpretation of Article 5§1 would therefore require a formal derogation under Article 15 (which permits derogations from certain Convention rights in time of war or other public emergency) in order for Contracting States not to be liable under the Human Rights Convention for an unjustified deprivation of liberty.

In the particular case the United Kingdom had fully complied with the Geneva Conventions but had not thought to enter a formal derogation from Article 5§1 of the Human Rights Convention in connection with the armed intervention by its troops in Iraq. Neither, it should be noted, had any Contracting State under the Human Rights Convention ever entered a derogation in similar circumstances. The Grand Chamber avoided the trap of irreconcilable obligations arising under the – specialist – Geneva Conventions and the – generalist – Human Rights Convention when there is co-existence of the safeguards under these two sources of international law, by adopting an interpretation of the requirements of Article 5§1 whereby the exhaustively listed permitted grounds of deprivation of liberty under that provision are to be “accommodated with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Geneva Conventions”. In so doing, I believe that the Strasbourg Court avoided a practically infeasible and unreasonable result, while not going so far as to hold that human rights and the Convention “have no place on the battlefield”.

Another rallying cry of the vocal critics of the Strasbourg Court is that it does not have sufficient regard to the democratic role of freely elected parliaments. The judgment delivered in April 2014 in the case of *The National Union of Rail, Maritime and Transport Workers v. United Kingdom* shows that that criticism is somewhat exaggerated. The challenge in the *RMT* case was directed against the statutory ban in the United Kingdom against secondary or sympathy strikes. The Strasbourg Court found no violation of the Convention’s safeguards of trade union freedom – mainly, I would say, because the two factual examples relied on by the Union were not the best ones for testing the potential of the trade-union-freedom clause to offer protection to workers in relation to secondary or sympathy strikes in circumstances where a case could be made out for the need for such protection (for example, where employers exploit the law to their advantage through resort to various legal stratagems such as de-localising work centres, outsourcing work to other companies and adopting complex corporate structures in order to transfer work to separate legal entities or to hive off companies). The Strasbourg Court considered that “the interference with the [applicant union’s] freedom of association in the set of facts ... relied on by it cannot objectively be regarded as especially far-reaching”. Be that as it may, the judgment contains some interesting dicta about how far it will review the merits of policy decisions embodied in primary legislation:

“In the sphere of social and economic policy, which must be taken to include a country’s industrial relations policy, the Court will generally respect the legislature’s policy choice unless it is ‘manifestly without reasonable foundation’ ...”

And then follows a reference to the *Hatton and Others* judgment from 2003, the Heathrow aircraft-noise case, where the Court adverted to the “direct democratic legitimation” that the legislature enjoys, after which comes the conclusion that, notwithstanding valid considerations of trade union solidarity and efficacy adduced by the applicant trade union,

“in their assessment of how the broader public interest is best served in their country in the often charged political, social and economic context of industrial relations, the domestic legislative authorities relied on reasons that were both relevant and sufficient for the purposes of Article 11”.

National Parliaments are thus, on the whole, recognised as enjoying a wide democratic margin of appreciation when it comes to deciding on economic and social policy for their country. One may disagree with and criticise individual judgments by the Strasbourg Court – and the *Hirst* judgment of 2005 on the statutory ban on prisoners’ voting is a good example of a judgment that has attracted criticism from many different quarters. But it is, I believe, far from the case that there is an unhealthy tendency for the Strasbourg Court to stray outside its legitimate role when called on to review primary legislation for compatibility under the Convention standards.

The last case I would like to mention is one where the facts may raise a smile, but where the Convention issues raised do not have such an evident answer. The applicant in the so-called “*Naked Rambler*” case was a Mr Gough, an ex-Marine, who, beginning in 2003, has been engaged in walking naked from one end of Britain to the other, from John O’Groats to Land’s End, because he adheres to a firm belief in the inoffensiveness of the human body and wishes to announce this to the great British public. He usually wears only walking boots, socks, a hat, a rucksack and a compass on a string around his neck. But he is otherwise naked.

He is accomplishing his project, not by walking through the countryside, the hills and the woods, but by using public roads going through crowded town centres. You can imagine that the reaction he has met has been mixed. In successive criminal proceedings brought against him in Scotland for breach of the peace, many female members of the public and those accompanied by young children gave evidence that they felt threatened and were alarmed, shocked and distressed. A special box had to be built in some court rooms because he insisted on appearing naked in court. He had to be kept in solitary confinement when in prison, given that the other prisoners did not wish to associate with him in his naked state. On being released, the first thing he would do outside the prison gates would be to strip off. On one occasion, after being craftily released back into England by the Scottish authorities, he immediately took a ‘plane back to Edinburgh to complete his walk and was already naked by the time he disembarked. Throughout his stay in Scotland he refused all offers of compromise from the authorities that would have allowed him to continue his naked ramble, but in a more discreet way.

Mr Gough claimed that he had been the victim of a violation of his freedom of expression and of his right to respect for his private life as a result of his repeated arrest, prosecution, conviction and imprisonment over seven years while crossing Scotland. His response to his detractors is that he does not think that what he is doing is indecent; that the human body is not indecent or dirty; that he does not see what the problem is; that he is fully aware that others have a

different point of view from his, but he is entitled to his and he will continue expressing it until it becomes accepted by others.

If the background facts had been one or two instances of arrest, prosecution and punishment, doubtless there would have been no arguable issue under the Convention. The complication is that Mr Gough's intransigence had led to an accumulation of convictions and sentences: between May 2006 and October 2012 he enjoyed a total of just seven days of liberty, thereby spending more time in prison than perhaps a rapist or violent bank robber would have.

In the end, the seven-judge Chamber unanimously found no violation of either freedom of expression or the right to respect for private life. The Court began by acknowledging:

“The applicant's case is troubling, since his intransigence has led to his spending a substantial period of time in prison for what is, in itself, usually a relatively trivial offence.

However, the applicant's imprisonment is the consequence of his repeated violation of the criminal law in full knowledge of the consequences, through conduct which he knew full well not only goes against the standards of accepted public behaviour in any modern democratic society but also is liable to be alarming and morally and otherwise offensive to other, un-warned members of the public going about their ordinary business.”

It continued:

“Article 10 [guaranteeing freedom of expression] does not go so far as to enable individuals, even those sincerely convinced of the virtue of their own beliefs, to repeatedly impose their antisocial conduct on other, unwilling members of society and then to claim a disproportionate interference with the exercise of their freedom of expression when the State, in the performance of its duty to protect the public from public nuisances, enforces the law in respect of such deliberately repetitive antisocial conduct.”

In so far as there could be said to be an interference with his right to respect for his private life, it was found to be justified for essentially the same reasons.

That sampler may give you a taste of the kind of case that arrives on the desk of the United Kingdom judge in Strasbourg.

6. The Convention and Other Contracting States

This is a vast subject that cannot easily be encapsulated in a few words. Let me focus on just one general phenomenon: The last 25 years have seen the centre of gravity of the Convention system shift in a number of ways.

To begin with, from the 1990's onwards, the community of States to which the Convention system applies changed considerably in its make-up, with the expansion to include members of the former Soviet bloc, some with a relatively recent, incomplete and sometimes fragile democratic base. The Court, like its parent Organisation, the Council of Europe, had acquired a new mission as a facilitator of transition from authoritarian rule to full democracy. Until 1989 the Convention could be described as serving largely as an international control mechanism for fine-tuning sophisticated national democratic engines that were on the whole working well (the second layer of protection referred to earlier). The nature, and not only the volume, of the cases submitted underwent change. Today this change can be confirmed in the current statistics which show a higher proportion than in previous epochs of violations found of the right-to-life-clause in the Convention (Article 2) (5.5% of the total in 2014) or of the clause prohibiting torture and inhuman or degrading treatment (Article 3) (almost 17% of the total). This metamorphosis of the Convention system and its international Court – as regards both numbers and mission – must inevitably affect what is to be expected of them.

The impact of the Convention and the Court's rulings on the former Soviet countries, and the latter's impact on the Convention system, have been considerable. One of the early Russian cases, *Kalashnikov*, on prison conditions has led to a revolution – for the good – in the conditions under which prisoners are held throughout Europe, but especially in the so-called new democracies. A general movement towards elimination of acceptance of inhuman and degrading treatment of prisoners is clearly perceivable. Winston Churchill, when Home Secretary in the early 1900s, declared that one major test whether a country was civilised was the way it treated its prisoners. That is no less true today. The duty on public authorities to carry out proper investigations into killings, suspicious deaths and violent crimes is now taken seriously in countries such as Bulgaria, whereas in the early years of their membership of the Convention system it was not. The number of pending Polish applications has fallen from 11,000 a few years ago to 2,000 or so today. This is mainly because the backlog of inadmissible cases has been wiped out and because prison conditions have improved, effective domestic remedies have been introduced and the Polish justice system, in particular the criminal justice system, is working better as a result of rulings from Strasbourg and the incorporation into their practice by Polish judges and prosecutors of the Convention standards. In many ex-Soviet countries there is an ever diminishing tendency for persons charged with criminal offences to be remanded in custody on a semi-automatic basis, being left to moulder there without proper, regular review for excessively long periods before being brought to trial. The examples could be continued. The list of countries concerned is long: Russia, Ukraine, Romania, Bulgaria, Albania, Moldova, Serbia, Bosnia, Montenegro and so on. And those are largely the countries with heavy caseloads and lengthy backlogs, but where, I believe, there are already significant benefits for the legal system and for the ordinary Joe in the street as a result of Convention membership.

In another category, the Turkey of today is not the Turkey of the 1990s, when hundreds, thousands of applications alleging serious violations – killings,

disappearances, torture, destruction of villages as well as prohibition of political parties and persecution of dissidents – were being lodged in Strasbourg – largely because the Turkish judicial authorities were absent from the scene. Now, although Turkey, like many of the Convention countries, is not yet a human rights paradise, prosecutors and courts in Turkey are investigating human rights cases and making a visible effort to apply human rights standards.

For most of the original, Western European States it can be said that the Convention is working relatively well, in the sense that the caseload is stable and there are no serious backlogs or serious worries about the human rights situation as displayed by the cases brought. Italy, with its problem of a malfunctioning judicial system, is of course an exception.

As far as the older participating States are concerned, the environment within which the Court operates also started to take on a new identity during the 1990s. The Convention and its accumulated case-law began to penetrate the fabric of domestic law and to be applied on a daily basis by national judges, whereas in earlier times the national legal systems did not on the whole take express account of the Convention standards. With mechanisms like the Human Rights Act in the United Kingdom, the subsidiary character of the Convention is progressively reinforced by the national authorities themselves, not only the courts but also the legislature and the executive, thereby repatriating to the domestic legal system much of the human-rights review function hitherto performed in Strasbourg.

The judicial review of national action that the Strasbourg Court is required to carry out has come to reflect this greater assumption by the national authorities of their primary responsibility for implementing the Convention rights within their national legal order. As human rights culture percolates deeper and deeper into European societies and, in particular, into the legal protection afforded to citizens by the national courts in a given country, so, as a corollary, the scrutiny of the international Court in Strasbourg into the substantive outcome and merits of a case is likely to become less intense. In recent years, the Strasbourg Court has spelt out that the margin of appreciation now means that if the independent and impartial national courts have analysed in a comprehensive and convincing manner the contested legal measure on the basis of the relevant human rights standards, the Strasbourg Court will need strong reasons to substitute its own, different analysis for that of the national judges. Statements to this effect can be found in, for example, the case of *Von Hannover v. Germany (No. 2)* in which the applicant, Princess Caroline of Monaco, was claiming that German law as applied by the German courts had not sufficiently protected her privacy from invasion by the media.

This deference to the human rights assessments made by the national courts – in countries where the legal system is working properly and where the courts can be regarded as independent and impartial, it should be emphasised – is normal and not to be regarded as backtracking or as an abdication of its responsibility by the Strasbourg Court. Rather, it is illustrative of the optimal functioning of shared responsibility. Ever improving national implementation of the

Convention rights necessarily means less call for external control by the Strasbourg Court and, correspondingly, greater weight being attached by the Court to the subsidiary character of the international remedy.

7. Likely Development of the Convention System in the Future

Under this head, let me limit myself to mentioning a darker side to the future brought into stark relief by the recent events in Ukraine: the re-emergence of crises in Europe involving large-scale violations of human rights or breakdown of the democratic political order. Such situations, which hark back to those that prompted the elaboration of the Convention in the wake of the Second World War, bring into play the Convention's first, basic layer of protection. The Greek Colonels' case provided an early, and happily isolated, example. Then came the Cyprus problem from 1974 onwards. This was followed in the 1990s by the 280 or so judgments in cases against Turkey finding serious violations (including killings, disappearances, ill-treatment, destruction of villages) which had taken place against the background of the armed conflict between the Turkish security forces and the PKK (the Workers' Party of Kurdistan), an illegal party. Subsequent to the establishment of the new single Court, we have had the Transdniestrian situation concerning Russia and Moldova; the NATO operation in former Yugoslavia and the war in Bosnia and Herzegovina; the flood of individual applications concerning Chechnya (more than 230 judgments delivered and 350 or so applications still pending – over 60% of these cases concerning enforced disappearances); the stand-off between Azerbaijan and Armenia over the disputed border territory of Nagorno-Karabakh; the events leading up to and including the war between Russia and Georgia in 2008; and now the events in Crimea and Eastern Ukraine, in relation to which applications from both sides of the divide have been lodged in Strasbourg.

The judgment awarding financial compensation – of 90 million euros – in the case of *Cyprus v. Turkey* concerning the 40-year old events of 1974 was delivered last year, 13 long years after the delivery of the principal judgment on the merits in this case. As regards the Transdniestrian situation, the express direction given to the respondent Moldovan and Russian Governments to release applicant prisoners being arbitrarily held in detention by the breakaway regime in Transdniestria did not lead to any positive concrete result: the applicants remained in prison; and thereafter the inflow of individual applications has continued. Interim orders indicating conservatory measures were early on issued in relation to the armed conflict between Georgia and Russia in 2008. After a first judgment delivered in July of last year concerning the collective expulsion of Georgian nationals from Russia in 2006, the inter-State proceedings are rolling on at gentle speed and a large number of related individual applications are pending. Notwithstanding this first, apparently fruitless exercise in granting interim measures in such a context of inter-State conflict, in March 2014 a similar grant was made in the inter-State case brought by Ukraine against Russia. Both Contracting Parties concerned were called on to refrain from taking any measures, in particular military actions, which might entail breaches of the Convention rights of the civilian population, including putting civilians' life and health at risk. Both States were asked to inform the Court as soon as possible of

the measures taken to ensure that the Convention is fully complied with. Watching news reports on the television, one may wonder what impact this international judicial grant of interim measures is actually having on the conduct of military actions on the ground and whether such instances of armed conflict are appropriate for interim measures at all.

All in all, this aspect of the Court's operation – that is to say, in such extreme contexts of crisis or conflict – is not exactly a success story. One writer, the academic Robert Harmsen, has surmised that “the boundaries of the system are being taken to – if not past – the breaking point of that which might be accomplished by a logic of judicial enforcement”. The question therefore arises: is the Strasbourg Court capable of dealing, constructively, preventively or contemporaneously, with large-scale events such as those occurring in Ukraine and with the systemic human rights problems they raise, affecting large swathes of the population? Or is it condemned to serving a largely historical, *ex post facto* role, as in the Cyprus case, one of assessing State conduct long after the event? That is to say, we are talking about the effectiveness of the Strasbourg Court and of the remedy it is capable of offering in such contexts of conflict usually pitting, one against another, two of the Convention's Contracting States.

For the rest, and in particular whether the procedural framework for bringing and examining examinations should be gently tweaked or, rather, drastically reformed so as to enable the Court to cope better with its caseload, the answer can only be: wait and see. The Court's current policy, I can safely say, is to endeavour to avoid radical reform through amendment of the Convention, perhaps tinkering with the operation of the right of individual petition and, rather, to seek solutions within the existing treaty framework. My impression is that that avenue for “development of the Convention system” will be explored – and exhausted – first before any far-reaching changes the Convention system are contemplated.